UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA, New York, N.Y.

v. 15 Cr. 773 (AJN)

JUSTIN ARIAS,

Defendant.

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June 10, 2016
4:00 p.m.

Before:

HON. ALISON J. NATHAN,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BY: FRANK BALSAMELLO
Assistant United States Attorney

MARK GOMBINER
Attorney for Defendant

(Case called)

MR. BALSAMELLO: Good afternoon, your Honor.

Frank Balsamello, for the United States.

THE COURT: Good afternoon.

MR. GOMBINER: Mark Gombiner, Federal Defenders for Mr. Arias.

Good afternoon, Judge.

THE COURT: Good afternoon, Mr. Gombiner.

And good afternoon, Mr. Arias.

MR. GOMBINER: This is Brittany Larson from our office, who is a social worker.

THE COURT: Good afternoon, Ms. Larson.

We are here for a sentencing today in United States v. Justin Arias, 15 Cr. 773. In preparation for today's proceeding I have reviewed the probation report, which is dated May 23, 2016.

I have also received and reviewed the following additional submissions: I have the defense submission dated June 6, 2016. I has attached as exhibits a letter from Mr. Arias' mother, a compilation of medical records, and a reentry, a reentry plan for Mr. Arias, and I have the government's submission dated June 7, 2016.

Counsel, anything else I should have in front of me for purposes of sentencing?

MR. BALSAMELLO: No, your Honor.

MR. GOMBINER: No, your Honor.
THE COURT: All right.
Can you confirm that you have received each other's submission?
MR. BALSAMELLO: Yes, we have.
MR. GOMBINER: Yes, Judge.
THE COURT: Thank you.
Turning to the presentence report, Mr. Gombiner, I know that you have, but can you confirm that you have reviewed the presentence report and discussed it with your client?
MR. GOMBINER: Yes, Judge.
THE COURT: Mr. Arias, I just want to make sure you had an opportunity to review the presentence report and raise any issues with your counsel regarding it.
Did you?
THE DEFENDANT: Yes, your Honor.
THE COURT: All right. Thank you.
Mr. Balsamello, for the record, have you reviewed the presentence report?
MR. BALSAMELLO: The government has, yes.
THE COURT: Thank you.
Setting aside for a moment the calculation of the sentencing guidelines, are there any objections to the report regarding factual accuracy
MR. BALSAMELLO: Not from the government.

MR. GOMBINER: No, Judge.

THE COURT: Thank you.

Hearing no objections, I will adopt the factual recitations set forth in the PSR and it will be made a part of the record in this matter and placed under seal. If an appeal is taken, counsel on appeal may have access to the sealed report without further application to this court.

Turning to the guideline calculation, as counsel is aware, I am no longer required to follow the United States Sentencing Guidelines, but I am still required to consider the applicable guidelines in imposing sentence and must therefore accurately calculate the sentencing guideline range.

We have sort of a series of disagreements as to the -- that is to say, I think you are in agreement now and I think I am in agreement with your agreement, but the PSR calculates a substantially different guideline range than the Pimentel letter, and Mr. Gombiner clearly disagrees with the PSR. The government was a little bit less clear as to what it thinks the actual appropriate guideline range is, saying at some points that it agrees with the PSR and then at other points that the 46- to 57-month range is appropriate.

Mr. Balsamello, just for clarity, what is the government's position?

MR. BALSAMELLO: The government's position is that as of today I believe the PSR accurately calculates the guidelines. However, looking forward to a pending change to the guidelines, and the situation with burglary, how that's treated as a crime of violence, that the 46 to 57 is an appropriate range to be considering now, that is, what the guidelines would calculate to under the modification to the guidelines that's pending. That's why we discussed that as a range we view as reasonable at this point. But in terms of as a technical matter calculating them today, I believe the probation report is correct.

THE COURT: So the government's position does not take into account *Johnson*?

MR. BALSAMELLO: It does, your Honor.

THE COURT: Let me ask if you are familiar with *United States v. Welch*, which is a Second Circuit summary decision.

MR. BALSAMELLO: Admittedly, your Honor, I am not personally familiar with it.

THE COURT: 2016 WL 576656, which concludes that second degree burglary under the New York provision following *Johnson* is not a crime of violence for purposes of 4B1.2 in the guidelines, the career offender provision, which as you know shares a definition of crime of violence under 2K1.1(a)(2).

MR. BALSAMELLO: Understood, your Honor.

To this point we haven't with Mr. Gombiner or in our submissions really discussed or delved into that issue because, considering where the guidelines are going, we are comfortable with the Court sentencing under the guidelines that would be applicable whether for *Johnson* reasons it's not considered or whether under sort of 3553 based on a forward-looking guidelines analysis that's the number that is reached. Either way we arrive at the same range.

THE COURT: OK. Mr. Gombiner?

MR. GOMBINER: Judge, I mean, I think I say it in the letter.

THE COURT: Could you pull up the microphone.

MR. GOMBINER: Sorry.

THE COURT: Thank you.

MR. GOMBINER: I cited on *Taylor* and I think *Welch* follows *Taylor*.

THE COURT: You did.

MR. GOMBINER: I don't think either of them count as crimes of violence either now or -- certainly they are not going to count in the next, after six weeks they are not going to count.

THE COURT: Right.

MR. GOMBINER: So I think we are all in agreement they should be 46 to 57, because I do -- although I am not happy about it, I think the obliterated serial number enhancement and the change in the criminal history score are --

THE COURT: Correct.

MR. GOMBINER: -- basically I don't have any arguments about those.

So, I mean, I would just hope the Court would find the guidelines as 46 to 57 months.

THE COURT: I do.

MR. GOMBINER: OK. So I don't want to --

THE COURT: I have to go through the exercise and say what they are now, and the government isn't willing to do the same, I think.

MR. GOMBINER: Thank you.

THE COURT: Let me tell you my calculation, and anybody tell me if they have an objection.

The base offense level is 14. I have stated it briefly, but I disagree with the PSR's calculation of Mr. Arias' offense level at 24 as an offense subsequent to two convictions of crimes of violence, his prior convictions for burglary in the second degree and attempted burglary in the second degree both under New York Penal Law Section 140.25.

The Second Circuit at least in a summary order recently held that in light of *Johnson v. United States* New York second degree burglary is not a crime of violence under Section 4B1.2, which shares a definition of crime of violence under 2K2.1(a)(2). I cited the case, but I will cite it again, *United States v. Welch*, 2016 WL 536656.

As the Second Circuit observes in this opinion and as the government just described, the Sentencing Commission has amended the guidelines to remove the residual clause from the guidelines effective August 1, 2016. For these reasons, I conclude that Mr. Arias' prior burglary convictions are not crimes of violence for purposes of his offense level calculation.

So we started with a base offense level of 15. Four levels are added for a firearm with an obliterated serial number, and four levels are added for possessing the firearm in connection with another felony offense.

That is an adjusted level of 22, minus 3 for acceptance of responsibility, and that is a total offense level of 19.

Mr. Arias' criminal history category is IV, and that would produce a guideline range of 46 to 57 months.

Any objections?

MR. GOMBINER: No, Judge.

MR. BALSAMELLO: Your Honor, without conceding any sort of *Johnson* issue for the office, I have no objection to you proceeding with that calculation.

THE COURT: I mean, your office conceded it in *Welch* as it turns out. Maybe your office should take a look at that decision.

MR. BALSAMELLO: Understood. Thank you.

THE COURT: Actually, I guess it was the western District. So it wasn't your office. I take that back.

In any event, you won't have to sweat it in six weeks I suppose, but here we are.

We will talk about variance in a moment, as the papers do, but I just want to confirm that neither side is seeking an upward or downward departure within the guidelines system.

MR. BALSAMELLO: We are not.

MR. GOMBINER: Not under the guidelines.

THE COURT: Nevertheless, I have considered whether there is an appropriate basis for a departure from the guideline range within the guidelines system and did not find that there are any grounds warranting a departure under the guidelines system. As I said, I'm happy to hear arguments as to variance.

Mr. Balsamello, do you wish to be heard?

MR. BALSAMELLO: Briefly, your Honor.

I think we would rest primarily on our submission. I think the two specific things I would highlight, Mr. Gombiner in his submission includes a reentry plan which I have seen a number of times now. I think it is sort of increasingly part of the Federal Defenders sentencing submissions.

I would note that I at least have some concern about the overcited implementation of these reentry plans. It obviously sets forth certain services and certain steps that I think everyone would want to see when the defendant is eventually released, but to look at that as a base for reducing his sentence without knowing sort of who is going to be putting that in place, how it will be in place, it is not under probation's purview, it is not under the Court's purview, it's sort of an advocacy piece as much as anything. It is somewhat concerning.

Looking at Mr. Gombiner's submission, something that stood out that I would just highlight is at the end sort of the takeaway from the whole thing is that it is worth taking a chance to sentence Mr. Arias to a shorter term and let him try the reentry plan.

I think that's very easy to say from someone removed from someone who is not likely to be shot at by Mr. Arias when he is released. But I would just focus on the fact the offense here is he possessed this firearm. He also discharged it at a group of people.

There is a very serious public danger concern here. His conduct is extremely serious, and it needs to be punished, deterred, and Mr. Arias incapacitated for some period of time the government believes within the 46- to 57-month guideline range being appropriate.

THE COURT: Thank you.

MR. BALSAMELLO: Thank you.

THE COURT: Mr. Gombiner.

MR. GOMBINER: I am a little puzzled as to why the government is concerned about the fact that we started trying to come up with some of these reentry plans. I think that is actually great positive development.

We do have Ms. Larson here, who is our social worker. And, I mean, this isn't some kind of gamesmanship device that we just write up a plan, and then, like, without any intention of following through on it.

The plan identifies very specific components. Like, it says what agency will be doing these things and our office has committed to helping to ensure through a weekly call of some kind or meeting that this plan is being adhered to.

OK. He hasn't been released from prison yet, so I can't say it's happened yet, because obviously it hasn't. I don't know why that would be a matter for concern. Like, it seems that it's somehow inappropriate for us to be doing that. That doesn't make sense to me.

THE COURT: Yes. It sounds like the government wants to make sure you're not pulling one over on me.

MR. GOMBINER: Right. OK.

Judge, I am just going to trust that the Court is able to fend for itself in that regard.

In terms of danger to society, like, I mean, we are not suggesting this is not a serious case and a serious thing that happened. Obviously, it is very serious. So no one is suggesting that.

But the way we are going to protect society is not, you know, keeping Mr. Arias in jail for a couple of -- like, you know, whether it is a 21- to 27-month guideline range, which the government would have been arguing under that Pimentel, was an appropriate range -- that isn't what it turned out to be. They didn't happen to know about this YO conviction. I guess, I mean, it's on me, too, neither of us really focused on the fact that the gun had an obliterated serial number.

THE COURT: Do you know what happened there? I mean, was the fact of the obliteration not known or just didn't --

MR. GOMBINER: It was obvious if you go back and look at it. I mean, which should have been, I mean, in some ways it may have been more obvious to the government because they are the ones who got the discovery material and disseminated it. I just overlooked it. I don't know if I would have done anything different. We probably, you know, still would have pled guilty, but I am not suggesting it would have changed our plea.

THE COURT: Right.

MR. GOMBINER: In any event, what I do think is important --

THE COURT: I am having trouble hearing you.

MR. GOMBINER: What I do think is important, and this is something that, you know -- I just was speaking some more to Ms. Castro, who is Mr. Arias' mother and is present here in court -- is that for years and years Ms. Castro has known that her son has some serious problems. You know, Ms. Larson thinks it might be attention-deficit/hyperactivity disorder, ADHD. But she describes to me, like, all the efforts she has made to try to get some real help for her son, and, like, essentially they have been ignored, you know, people just, you know, I guess it's what happens when you are, you know, poor and don't have a lot of clout with anyone. But it is, you know, easier just to put someone in jail than it is to spend the energy to try to deal with those problems. And, I mean, OK, this was a very serious crime. It is also the kind of thing that somebody who has ADHD might be more likely to do.

This was, you know, Mr. Arias and his friend got into an argument with this group of people. Some of the other people apparently may have been armed or shown a knife or something. And Mr. Arias, just, you know, responded in an impulsive, thoughtless, reckless manner, which is, you know, that's kind of one of the hallmarks of somebody who has ADHD.

Now, that's not, like, a defense. We are not saying, OK, well it's fine, you know, or anything like that.

I mean, if we want to prevent that in the future, we have to deal with it. I mean, he needs some, like, actual attention paid to that, because otherwise that's just going to -- I'm not saying the same thing is going to happen. Nothing like this had ever happened before. Mr. Arias does not have any history of violence. He's got a history of, you know, he's committed some crimes before, but they weren't violent crimes.

THE COURT: No prior guns.

MR. GOMBINER: No prior gun. He didn't possess any weapons before. This wasn't really his gun. It was kind of a community gun that he got. OK, I mean a community gun isn't, like, really any greater, like, that's not so good either. You know, he had it, he fired it. So I'm not doubting that, just so the Court knows.

But I do think that, you know, it is worth taking a chance. It will give the guy a little shorter of a sentence, and we will try to work and deal with what's really the problem.

I mean, it sort of mystifies me in a way why the government would be arguing, like, somehow we are being callous to the people who were being shot at by Mr. Arias. I think they would prefer, you know, that he not be the same kind of person who might do that again. So, we are trying to come up with a constructive way to deal with it.

THE COURT: Let me ask, Mr. Gombiner, it is not included in the proposed supervision terms in this PSR, I don't think, but I do sometimes have proposed to me a provision that the defendant shall participate in an outpatient mental health program, which seems to me consistent with the mental health component of the reentry plan you submitted.

MR. GOMBINER: Yes. I think that is a condition that absolutely should be part, whatever the sentence is, should be part of any supervised release conditions.

THE COURT: That would address --

MR. GOMBINER: I would completely endorse that.

THE COURT: That addresses, at least in that respect, Mr. Balsamello's concern about the lack of enforceability --

MR. GOMBINER: Yes.

THE COURT: -- of that aspect of the reentry plan.

MR. GOMBINER: Right.

If you want to order all the conditions as far as the reentry plan, that is fine with us too. That is OK. I don't have any objection.

I mean, you know, I don't want to put it on Ms. Larson's shoulders that she's going to be like, you know, violating supervised release if she doesn't, but, you know, that would be fine.

THE COURT: What do you think about that, Mr. Balsamello?

MR. BALSAMELLO: I think that actually would address much of the issues if it were a part of supervision that the court imposes. I am not sure the extent to which the Court can direct the Federal Defenders office to do anything specific. It is probation --

THE COURT: I can certainly, as I have in many cases, impose a requirement of participation in an outpatient medical health program approved by the probation office, and I can encourage working with the Federal Defenders certainly in that regard. But, under the penalty of further punishment for failure to participate, it would require Mr. Arias to participate in mental health treatment.

MR. BALSAMELLO: Understood. I agree that is something that is warranted. I would still take the position that the guideline range is appropriate given the conduct and other considerations. I do just want to clarify that my comments earlier were not suggesting any nefarious intent by anyone.

I think the intentions are correct and that the goals of such a plan are ones that everyone agrees on. I don't think the Court is getting duped by anything. It really is a matter of implementation and not doing sort of a plan is one thing, but what does it mean when the defendant is ultimately released?

MR. GOMBINER: Also, just to make one thing clear from our side, we are not dissing the probation officer saying that they do -- I mean, the probation officers, many of them are very concerned and they are very -- this isn't about, like, probation being bad. It just that I think, you know, if we help with this, and come up with a, like, maybe a little more global proposal that that's additional assistance. So I don't want to be like, you know, this isn't a war with the probation office.

THE COURT: I didn't understand to be. And I am happy to see the reentry plan here and in other cases.

MR. GOMBINER: Thank you.

Judge, the other thing I do want to just remind the Court was that Mr. Arias -- I mean, this is just unfortunate that it happened -- has had a very serious and ongoing issue with his leg. He is still walking with a cane -- or his hip really.

And that's just, an additional, you know, thing he has to overcome. I think it also, just on a practical level, lessens the risk of any repeats of violence, but he's not very mobile right at the moment or is likely to be, because what they had to do is they had to put some, I think it's called -- I can't think of it, some name for it. It's some kind of like bone. I think they take it from cadavers and they had to put that in his hip and put a screw in and everything because his hip was on the point of -- it was already fractured. It was on the point of breaking. So that was a pretty serious operation, and it is still causing him a lot of pain. The last medical notes I noticed is that the sclerosis seemed a little worse. It is an ongoing problem.

THE COURT: Right.

MR. GOMBINER: But I do think that a sentence within the range of the government's initial Pimentel letter would be the appropriate sentence. Thank you.

THE COURT: Thank you, Mr. Gombiner.

All right. Mr. Arias, you don't have to make a statement to the Court, but if you would like to, you may do so now, sir.

THE DEFENDANT: I would like to apologize for my actions. Me meeting with my social worker, Ms. Larson has shown me that there is a lot of opportunities out there to help me with my issues as far as mental health, employment training and education, and I'm willing to put the effort in and succeed in my life.

THE COURT: Thank you, Mr. Arias.

Counsel, anything else to bring up before I give my sentencing conclusion?

MR. BALSAMELLO: No, your Honor. Thank you.

MR. GOMBINER: No, Judge.

Thank you very much.

THE COURT: All right.

As I have stated, the guideline range applicable to this case is 46 to 57 months' imprisonment. Under the Supreme Court's decision in *Booker* and its progeny, the guideline range is only one factor the Court must consider in deciding the appropriate sentence.

I'm also required to consider the other factors set forth in 18 U.S.C. Section 3553(a). These include the nature and circumstances of the offense and the history and characteristics of the defendant, the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed education or vocational training, medical care or other treatment in the most effective manner.

I am to take into account the kinds of sentences available, as I've said, the guideline range and any pertinent policy statement, the need to avoid unwarranted sentence disparities among defendants with similar records, and the need to provide restitution to any victims of the offense.

I am required to impose a sufficient, but no greater than necessary, to comply with the purposes I have just described.

I have given substantial thought and attention to the appropriate sentence in this case in light of the 3553(a) factors and the appropriate purposes of sentencing as reflected in the statute.

I am concerned about the very serious and dangerous conduct in issue here. Mr. Arias has pled guilty to being a felon in possession of a firearm. Specifically, he actively shot a firearm following a dispute. It's obviously very dangerous conduct. Thankfully nobody was hurt, but certainly someone could have been, including innocent bystanders.

Given the dangerous nature of the conduct, a serious sentence is warranted to reflect the seriousness of the offense, to protect the public from further crimes of the defendant, and to deter Mr. Arias and others.

Deterrence is additionally necessary here as this is not Mr. Arias' first offense. It is his third felony conviction in the last four years. He's faced prior incarceration that has not sufficiently deterred his criminal conduct. This concern is further underscored by the fact that Mr. Arias was on parole when he committed this offense.

But, of course, I must and I do take into account the history and characteristics of this defendant. I mentioned his prior convictions, none of which were violent. There are no prior gun charges. That matters to me. Mr. Arias has pled guilty and accepted responsibility. That, too, is important to me in deciding what sentence to impose.

Mr. Arias is young, just 21 years old. Based on the record before me, it's clear he has faced challenges in his life and faces continuing challenges with the health issues he faces now.

I am pleased to see that there is a serious reentry plan in place to assist Mr. Arias following his period of incarceration. At base, I will vary to some extent below the guideline sentence imposed here so that the sentence is sufficient, but no greater than necessary, to comply with the purposes I have just described.

I will now state the sentence I intend to impose.

Mr. Arias, will you please rise.

It is the judgment of this Court that you are to be remanded to the custody of the Bureau of Prisons for 36 months, to be followed by a period of three years of supervised release.

Please be seated, sir.

During your period of supervised release, the standard conditions of supervised release shall apply. In addition you will be subject to the following mandatory conditions:

You shall not commit another federal, state, or local crime.

You shall not illegally possess a controlled substance.

You shall not possess a firearm or destructive device.

You shall refrain from any unlawful use of a controlled substance and shall submit to one drug testing within 15 days of placement on supervised release, and at least two unscheduled drug tests thereafter as directed by the probation officer.

You shall cooperate in the collection of DNA as directed by the probation officer.

In addition you will be subject to the following special conditions:

You will be subject to the search term that's outlined on page 19 of the PSR in paragraph 1, that you shall submit your person, residence, and place of business, vehicle or any other premises under your control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of release may be found.

You shall report to the nearest probation office within 72 hours of release from custody.

I do recommend that you be supervised in your district of residence.

Consistent with the reentry plan submitted and as discussed earlier, I'm also imposing the following special condition:

You shall participate in an outpatient mental health program approved by the United States probation office, and you shall continue to take any prescribed medication unless otherwise instructed by health care providers. You shall contribute to the cost of services rendered not covered by third-party payment if you are able to pay. I do authorize the release of available psychological and psychiatric evaluations and reports, including the presentence investigation report, to the health care provider.

I would like to impose all of the conditions of the reentry plan. I don't have specific terms for them for inclusion in the PSR, so I will just include as a formal matter the ones I've outlined, but will certainly assume that with Ms. Larson and with the Federal Defenders that all aspects of the reentry plan, every effort will be made to follow through with them, as I believe that the purposes of punishment that I described will be aided by Mr. Arias' commitment to the plan as has been submitted to me.

I will waive the fine, because I don't believe Mr. Arias has the ability to pay the fine. I am imposing a mandatory special assessment of $100, which will be due immediately.

I believe there's nothing to take up regarding restitution or forfeiture, Mr. Balsamello.

MR. BALSAMELLO: That's correct.

THE COURT: Does either counsel know of any legal reason why the sentence should not be imposed as stated?

MR. BALSAMELLO: No, your Honor.

MR. GOMBINER: No, Judge.

THE COURT: The sentence is imposed as stated. I do find the sentence is sufficient, but not greater than necessary, to satisfy the sentencing purposes I described earlier.

Mr. Arias, when you are released and on supervised release you will have the guidance and support of the probation department as you reestablish your day-to-day life during your period of supervised release. I do urge you to take advantage of these resources in addition to the ones that the Federal Defenders will work with you on. All of those folks are committed to helping you succeed.

That said, I have to caution you that you must comply strictly with all of the conditions of your supervised release. If you are brought back before me for any violations of those conditions, I may sentence you to another term of imprisonment, and I hope and expect you won't put me to that decision.

Mr. Gombiner, any requests regarding designation of prison location?

MR. GOMBINER: Just a facility as close to New York as possible that's able to provide the appropriate medical care for Mr. Arias.

THE COURT: I do make the recommendation to the Bureau of Prisons for a facility as close to New York City as possible to help facilitate ties with his family and to provide the appropriate facility that can provide the appropriate medical care for Mr. Arias in light of his documented and serious medical conditions.

Mr. Balsamello, are there any remaining counts or underlying indictments that need to be dismissed at this time?

MR. BALSAMELLO: No, your Honor.

THE COURT: Mr. Arias, I see no basis for an appeal, but I am required to inform you of your appellate rights.

To the extent you have not given up your right to appeal your conviction through your plea of guilty and the agreement that you entered into with the government in connection with -- well, there was no agreement, so just to the extent you have not given up your right to appeal, you do have the right to appeal.

If you are unable to pay the cost of an appeal, you may apply for leave to appeal in forma pauper, which means with no cost to you for filing fees. The notice of appeal must be filed within 14 days of the judgment of conviction.

Counsel, is there anything else that I can address at this time?

MR. BALSAMELLO: No, your Honor.

MR. GOMBINER: No, Judge. Thank you.

THE COURT: All right.

If there's nothing further, Mr. Arias, good luck to you, sir. I am glad to see the reentry plan in place, and I'm glad that the assistance of Ms. Larson has been helpful to you and I hope that you take full advantage of that during your period of supervised release.

THE DEFENDANT: Thank you, your Honor.

THE COURT: Good luck to you, sir.

THE DEFENDANT: Thank you.

THE COURT: We are adjourned.

(Adjourned)